No. 82-1998

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

WILLIAM P. CLARK, SECRETARY OF THE INTERIOR, *et al.*,
Petitioners,

—v.—

THE COMMUNITY FOR CREATIVE NON-VIOLENCE, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE NATIONAL COALITION FOR THE HOMELESS AS *AMICUS CURIAE* IN SUPPORT OF AFFIRMANCE

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INTEREST OF *AMICUS CURIAE*

The National Coalition for the Homeless is a not-for-profit corporation established in 1981. It serves as an umbrella federation for hundreds of organizations, agencies and individuals throughout the country committed to the principle that the provision of decent shelter is a prime obligation of a civilized society. The Coalition is directed by a national coordinating committee with representatives from approximately 40 cities and regions throughout the United States.

The Coalition has a special interest in the issues before the Court. A primary activity of the Coalition is that of bringing

the plight of the homeless to the attention of the American people and various government authorities. The Coalition has found that a recognition and understanding of homelessness frequently translates into support for public policies that aid the homeless.

This *amicus* brief outlines the dimensions of homelessness in America in order to make clear the significance of sleeping in respondents' proposed demonstration.[1] Sleep, in the context of the demonstration, is crucial not only because of its central symbolism, but also because without it the message of the demonstration is lost. In addition, the magnitude of homelessness in this country is far greater than most realize. Without effective demonstration, the homeless simply have no way even to begin to get across the problems detailed in this brief.

INTRODUCTION

Respondents applied for a National Park Service permit to hold a 24-hour-a-day demonstration in Lafayette Park and on the Mall which would include sleeping outdoors in wintertime in these highly visible public parks to communicate to the public the plight of the homeless in America. The Park Service granted respondents a permit to maintain a 24-hour-a-day presence at the demonstration sites, to set up tents, to sit and lie down on blankets in and around the tents, and to feign sleeping. However, it refused respondents' application to be allowed actually to sleep as part of their demonstration, on the basis that sleeping in this context would violate the Park Service's regulations against camping. Respondents urge that the Court affirm the Court of Appeals' determination, 703 F.2d 586 (D.C. Cir. 1983), that the Park Service's "anti-camping" regulations, as applied to respondents' proposed sleeping activities, unconstitutionally violated respondents' First Amendment right of speech. The National Coalition for the Homeless respectfully submits this brief similarly urging affirmance.

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1 The parties have consented to the filing of this brief, and documents conferring consent have been filed with the Clerk of the Court pursuant to Supreme Court Rule 36.2.

STATEMENT ON THE DIMENSIONS AND CAUSES OF HOMELESSNESS

A. The Homeless Constitute a Large, Totally Disenfranchised Segment of the Nation

Establishing with precision the number of homeless[2] persons in the United States, or in any single region, is impossible, but there is no question that the number is high and that the problem is national, rural as well as urban. Current estimates of the number of homeless persons in the United States range from two to three million.[3]

With respect to individual regions, a compilation by the National Governors' Association in 1983 of estimates of the number of homeless in various cities shows the national scope of the problem. In New York City, 60,000 homeless men, women and children were seen by public and private agencies during 1982. *Report to the National Governors' Association, supra*, at 16. Estimates of the number of homeless range up to 25,000 in Chicago; 30,000 in Los Angeles; 8,000 in Philadelphia; over 7,600 in St. Louis; 10,000 in San Francisco; 3,800

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2 As used herein, the term "homeless" includes all those "whose primary nighttime residence is either in the publicly or privately operated shelters or in the streets, in doorways, train stations and bus terminals, public plazas and parks, subways, abandoned buildings, loading docks and other well-hidden sites known only to their users." E. Baxter & K. Hopper, *Private Lives/Public Spaces: Homeless Adults on the Streets of New York City* 6-7 (1981) (hereinafter cited as *Private Lives/Public Spaces*). Such definition encompasses the individual homeless respondents in this action. *See also* M. Cuomo, *1933/1983—Never Again: A Report to the National Governors' Association Task Force on the Homeless* 15 (1983) (hereinafter cited as *Report to the National Governors' Association*).

3 *Compare* estimate of the United States Department of Health and Human Services, HHS News, Nov. 25, 1983, at 1 (two million homeless Americans), *with* estimate of Community for Creative Non-Violence, M. Hombs and M. Snyder, *Homelessness in America: A Forced March to Nowhere* xvi (1982) (hereinafter cited as *Homelessness in America*) (between two and three million homeless Americans). *See also* The Robert Wood Johnson Foundation & The Pew Memorial Trust, *Health Care for the Homeless Program* 5 (1983). At the height of the Great Depression there were believed to be somewhere between one and two million homeless Americans. *See* Andersen, *Left Out in the Cold*, Time, Dec. 19, 1983, at 14-15; W. Leuchtenberg, *Franklin D. Roosevelt and the New Deal* 2-3 (1963).

in St. Joseph, Missouri; over 2,500 in Worcester, Massachusetts; and 3,000 in Phoenix. *Id.* at 16-18. A state task force appointed by Governor Kean of New Jersey has reported a minimum of 20,000 homeless in that state. *Report of the Governor's Task Force on the Homeless* 2 (1983). Mayor Ted L. Wilson of Salt Lake City has estimated 1,000 homeless in his city. *Homelessness in America: Hearing Before the Subcomm. on Housing and Community Development of the House Comm. on Banking, Finance and Urban Affairs*, 97th Cong., 2nd Sess. 164 (1982) (hereinafter cited as *Congressional Hearing*). Homelessness is also prevalent in rural areas, though often the rural homeless are "invisible" because they are widely dispersed and many eventually migrate to urban centers. *Report to the National Governors' Association, supra*, at 19.

Everywhere, the problem of homelessness is growing.[4] Available shelter space has not kept pace with the increasing number of homeless persons: "few would dispute the claim that, in the course of the last few years, homelessness in the United States has quietly taken on crisis proportions." *Report to the National Governors' Association, supra*, at 18; *see also* National Coalition for the Homeless, *The Homeless and the Economic Recovery* 1 (1983) (hereinafter cited as *The Homeless and the Economic Recovery*). A special assistant to the Mayor of Seattle has reported that 2,466 homeless people were turned away in a single month from Seattle's emergency shelter network. *Congressional Hearing, supra*, at 383. During its first year of service, in 1982, Loreto House, an emergency shelter for women and children in Holyoke, Massachusetts, turned away 3,000 homeless women and children. *Id.* at 511 (statement of Pat O'Connell, Western Massachusetts Coalition for the Homeless). In New Jersey, only 700 beds were reported to be available to a homeless population estimated at 20,000. *Report of the Governor's Task Force on the Homeless, supra*,

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4 According to the Daily Shelter Census Statistics of the New York City Human Resources Administration, the number of homeless families in emergency shelters in New York City increased by 100 per cent in the 12 months ending December 1983, and the number of homeless single men and women in city shelters rose 40 per cent during the same period. The deputy commissioner of the city's Human Resources Commission recently reported that more people spent the night in city shelters than at any time since the Depression. N.Y. Times, Jan. 23, 1984, at A1, col. 5.

at 2; Statement of Governor Thomas H. Kean, at 5 (October 24, 1983) (discussing findings of the Task Force on the Homeless).

Despite the increasing size and diversity of the homeless population, homeless persons in America have no access to traditional political channels: "[T]he homeless have no political influence. Only publicity, moral pressure and an occasional court decision can prompt attention to their needs." N.Y. Times, Jan. 23, 1984, at A20, col. 1.[5] The traditional means by which groups in America call attention to and improve their conditions, such as organizing, lobbying, petitioning their representatives, advertising in newspapers, on radio and television, and manning telephone banks, are unavailable to those who have no residence of any kind. In every state, to be without a home is to be disenfranchised, since the lack of a mailing address or other proof of residence within the state disqualifies the homeless from registering to vote.[6]

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5 *See also Callahan v. Carey*, N.Y.L.J., Dec. 11, 1979, at 10, col. 4 (N.Y. Sup. Ct. Dec. 5, 1979) (holding that, under New York law, New York State and New York City are required to provide shelter to the homeless).

6 *See, e.g.*, ALA. CONST. art. VIII, § 178; ALASKA STAT. §§ 15.05.010, 15.07.060 (1982); ARIZ. REV. STAT. ANN. §§ 16-121, 16-152 (Supp. 1983); ARK. CONST. art. III, § 1; CAL. CONST. art. II, § 2; CAL. ELEC. CODE § 500 (West Supp. 1982), *but see* § 207 (West 1977); COLO. REV. STAT. § 1-2-101 (1980), §§ 1-2-102, 1-2-202-203 (Supp. 1982); CONN. GEN. STAT. ANN. §§ 9-12, 9-27 (West Supp. 1982); DEL. CODE ANN. tit. 15, §§ 1302, 1701 (1981); D.C. CODE ANN. § 1-1302(2)(A)(1981), § 1-1311 (Supp. 1983); FLA. STAT. ANN. §§ 97.041, 98.111 (West 1982); GA. CODE ANN. §§ 21-2-219, 21-2-217 (Supp. 1983); HAWAII REV. STAT. §§ 11-12, 11-15 (1976); IDAHO CODE §§ 34-402, 34-412 (Supp. 1983); ILL. ANN. STAT. ch. 46, §§ 3-1, 3-2, 4-8 (Smith-Hurd Supp. 1982); IND. CODE ANN. § 3-1-7-9 (Burns Supp. 1983), § 3-1-7-26 (Burns 1982); IOWA CONST. art. II, § 1, IOWA CODE ANN. § 48.6 (West Supp. 1982); KAN. CONST. art. V, § 1, KAN. STAT. ANN. § 25-2309 (1981); KY. REV. STAT. ANN. § 116.025 (Bobbs-Merrill Supp. 1982), § 116.049 (Bobbs-Merrill 1982); LA. REV. STAT. ANN. § 18:101 (West 1979), § 18:104 (West Supp. 1982); ME. REV. STAT. ANN. tit. 21, § 41.1 (1964), § 201 (Supp. 1983); MD. ANN. CODE art. 33 §§ 3-4, 3-6 (1983); MASS. ANN. LAWS ch. 51, §§ 1, 1-A (Michie/Law. Co-op. 1978); MICH. STAT. ANN. §§ 6.1492, 6.1495 (Callaghan 1983); MINN. STAT. ANN. §§ 201.014, 201.071 (West Supp. 1982); MISS. CONST. art. XII, § 241 (amended 1972), MISS. CODE ANN. § 23-5-303 (Supp. 1983); MO. ANN. STAT. §§ 115.133, 115.155 (Vernon 1980), § 115.132 (Vernon Supp. 1984); MONT. CODE ANN. § 13-1-111 (1983); NEB. REV. STAT. §§ 32-102, 32-223 (1978); NEV. REV. STAT.

B. Strategies of Survival

The exigencies of everyday life for the homeless turn on three essential needs: a safe place to sleep, sufficient food (either purchased, begged, or received through soup kitchens and breadlines) and access to toilet and sanitary facilities.

1. *A Safe Place to Sleep*

The central pursuit in the daily life of any homeless person is the quest for shelter, secure from the elements and from crime. This constant effort is definitive of the homeless way of life. In Pittsburgh, homeless men sleep in caves above the Allegheny River. *Report to the National Governors' Association, supra*, at 58. In Atlanta, homeless people live under the bridges of interstate highways. *Congressional Hearing, supra*, at 468 (statement of Rev. Eduard Loring, Director, Open Door Community). In Los Angeles and in Texas, homeless families, many having migrated from northern industrial cities, sleep in abandoned automobiles. *Congressional Hearing, supra*, at 380 (statement of Kevin Moriarity, Director, Human Resources and Services, San Antonio, Texas); L.A. Times, Dec. 26, 1982, § 1, at 1, col. 1. In Washington, D.C., the homeless exploit the free steam escaping from the heating grates around the city. *Homelessness in America, supra*, at 109.

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§§ 293.485, 293.517, 293.530 (1981); N.H. REV. STAT. ANN. §§ 654.1, 654.7 (Supp. 1983); N.J. STAT. ANN. §§ 19:31-5, 19:31-3 (West Supp. 1983); N.M. CONST. art. VII, § 1, N.M. STAT. ANN. § 1-4-20 (1978); N.Y. ELEC. LAW §§ 5-102, 5-500 (McKinney 1978); N.C. GEN. STAT. §§ 163-55, 163-72 (1982); N.D. CENT. CODE § 16.1-01-04 (1981); OHIO REV. CODE ANN. § 3503.07 (Page 1972), § 3503.14 (Page Supp. 1982); OKLA. CONST. art. III, § 1, OKLA. STAT. ANN. tit. 26, § 4-112 (West Supp. 1983); OR. CONST. art. II, § 2, OR. REV. STAT. § 247.121 (1981); PA. STAT. ANN. tit. 25, §§ 623-21, 623-19-20 (Purdon Supp. 1982); R.I. GEN. LAWS §§ 17-1-3, 17-9-6 (Supp. 1983); S.C. CODE ANN. §§ 7-5-120, 7-5-170 (Law. Co-op. 1977); S.D. CODIFIED LAWS ANN. §§ 12-3-1, 12-4-7.3 (1982); TENN. CODE ANN. §§ 2-2-102, 2-2-116 (Supp. 1983); TEX. ELEC. CODE ANN. §§ 5.02, 5.13b (Vernon Supp. 1982); UTAH CODE ANN. §§ 20-1-17, 20-2-11 (Supp. 1983); VT. STAT. ANN. tit. 17, §§ 2121, 2145 (1982); VA. CODE §§ 24.1-41, 24.1-22 (1980); WASH. CONST. art. VI, § 1 (amended 1974), WASH. REV. CODE ANN. § 29.07.070 (Supp. 1982); W. VA. CONST. art. IV, § 1, W. VA. CODE § 3-2-19 (1979); WIS. STAT. ANN. §§ 6.02, 6.15, 6.33 (West Supp. 1983); WYO. STAT. §§ 22-3-102, 22-3-103 (1977).

In New York and Washington, D.C., phone booths serve as places to sleep for some of the homeless. *Private Lives/Public Spaces*, *supra*, at 84-a; Wash. Post, Jan. 24, 1983, at D1, col. 4. In Chicago, many homeless make use of unattended cars and trucks, sheltered spots under bridges or in back alleys, and the city parks; for others, the public transportation system provides regular mobile sleeping quarters. Task Force on Emergency Shelter, *Homelessness in Chicago* 40 (1983). In Cleveland, Ohio, and Birmingham, Alabama, Salvation Army officials have found clothing collection boxes appropriated as makeshift shelters by the people for whom the discarded clothing was intended. *Congressional Hearing*, *supra*, at 70; *Report to the National Governors' Association*, *supra*, at 20. Cardboard boxes have been pressed into service as shelter by the homeless in San Francisco and New York. *Private Lives/Public Spaces*, *supra*, at 99; *Report to the National Governors' Association*, *supra*, at 63. Still others among the homeless, in New York, Boston and Pittsburgh, among other cities, find temporary respite in abandoned buildings with no heat, plumbing or windows. N.Y. Times, Mar. 25, 1980, at B1, col. 2; *Private Lives/Public Spaces*, *supra*, at 87; K. Winograd, *Street People and Other Homeless—a Pittsburgh Study* 7 (1983). The pattern is simple: where refuge can be found or fashioned, it is being used.[7]

2. *Securing Food*

Securing food or the funds needed to purchase food is a similarly debilitating task for the homeless. Demand for food far outstrips the meals provided by voluntary kitchens. *See, e.g.*, Coalition for the Homeless, *Empty Promises/Empty Plates: Hunger in New York City* 1 (1983); *Report to the National Governors' Association*, *supra*, at 9-13. The portrait

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7 The most extensive research into the search for a secure place to sleep has been conducted in New York City. One common tactic, particularly for women, is to walk the streets all night, then find a few hours of sleep during daylight hours in church pews or train stations (which are safer in daytime). *Private Lives/Public Spaces*, *supra*, at 75. The New York Transit Authority has estimated that 6,000 homeless persons sleep in the subway system each night. Testimony of S. Brezenoff, Commissioner of the Human Resources Administration, before the General Welfare Committee of the New York City Council (Jan. 26, 1981).

of the poor rummaging through trash cans and garbage dumpsters has become commonplace. N.Y. Times, Jan. 2, 1983, § 6 (Magazine), at 21, col. 1.

Where food cannot be obtained, the homeless strive for the dollars needed to purchase it. This, like the quest for sleeping space, becomes an all-consuming activity. Day labor is now very scarce on America's skid rows, *Report to the National Governors' Association*, *supra*, at 4, and begging is considered too shameful by many of the homeless. *Private Lives/Public Spaces*, *supra*, at 83-84. In many cities, the homeless recover waste aluminum, gaining little more than a few cents per pound for their labor. L. Stark, K. MacDonald-Evoy & A. Sage, *A Day in June* 5 (1983) (hereinafter cited as *A Day in June*). In states with "bottle bills," scavenging becomes slightly more lucrative: up to a few dollars a day can be earned. N.Y. Sunday News, Jan. 15, 1984, § 1, at 5, col. 1. In Minneapolis, a December 1982 survey of the homeless in emergency shelters found that over 35 per cent sold plasma to blood banks as a source of income. Hennepin County Office of Planning & Development, *A Survey of Clients in Emergency Shelters* 10 (1983). In Phoenix, 25% of 181 homeless individuals interviewed on a single day in June 1983 had either sold blood or scrap aluminum that day. *A Day in June*, *supra*, at 5.

3. *Hygiene*

The quest of the homeless for minimal hygiene is exacting. Most cities in the United States have few, if any, public toilets, and public baths are now virtually extinct. *Private Lives/Public Spaces*, *supra*, at 80. While it has been found that filth and odor are used by some homeless women as a conscious defense against intruders, the overriding fact is the unavailability of facilities for the hygiene needs of the homeless. *Id.* In New York, "for the penniless, public bathrooms, bathing and laundry facilities are so scarce, and the access to them so limited, that cleanliness is virtually impossible." *Private Lives/Public Spaces*, *supra*, at 80. In Atlanta, business leaders are fighting a proposal to create public bathrooms because, the businessmen say, toilets will only serve to "spawn crime." N.Y. Times, Dec. 19, 1983, at A17, col. 1. The effort to maintain some standard of cleanliness is strenuous, even painstaking, for the homeless.

C. Factors Leading to Homelessness

There is no single path to homelessness, but whatever the mix of factors, they relate heavily to the actions and inactions of Federal, state and local governments. A principal explanation is that housing has become a scarce resource. Competition for that resource has become fierce, and the losers are the weakest of the poor—the mentally disabled, elderly, physically infirm, ill-educated, structurally unemployed and single parent families.

At the same time that the housing market for the poor has contracted, their resources to pay for housing have decreased. The most common antecedent to homelessness is loss of income. This typically occurs through loss of work combined with exhaustion of all savings and unemployment benefits and cut-backs in various aid programs.[8] Poor households have been especially hard hit by the failure of income to keep pace with inflation.[9] Moreover, the capacity of low income persons to compete for housing has been reduced by the failure of public or private agencies to provide after-care support to disabled persons and community-based care to the mentally ill. *Private Lives/Public Spaces*, *supra*, at 38-40. Personal circumstances, such as the loss of the principal means of support, through death, disability or abandonment, conspire with these economic and social forces to render a person or family homeless. *Id.* at 40.

1. *Housing*

Each year 2.5 million Americans are displaced from their homes due to revitalization of neighborhoods, eviction,

8 The poverty rate in the United States has increased in recent years—it now stands officially at 15%, or 34.4 million Americans, the highest in 17 years, according to most recent statistics. U.S. Department of Commerce, Bureau of the Census, *Money Income and Poverty Status of Families and Persons in the United States: 1982*, P-60 Current Population Reports 20 (1983); N.Y. Times, Oct. 19, 1983, at A22, col. 1.

9 Between 1970 and 1980, median income of renters increased 67%, while median rent increased 123%. In addition, almost all households with income below $5,000 pay more than half their income for shelter, while those with income of over $20,000 generally pay roughly a quarter of their income for shelter. National Low Income Housing Coalition, *Call to Action* 5 (July 1, 1983).

economic development and rent inflation. C. Hartman, D. Keating & R. LeGates, *Displacement: How to Fight It* 3 (1982) (hereinafter cited as *Displacement*). Over the past decade, most cities have created incentives for the revitalization of downtown areas, a process sometimes called "gentrification," and the poor cannot afford the inflated rents that result. Between 1975 and July 1981 in New York City, 66 per cent of low rent single room occupancy hotels were lost. C. Green, *Housing Single, Low-Income Individuals* 6-7 (1982). This problem is not limited to urban areas or to rental housing:

> "The Mortgage Bankers Association reports that one hundred and thirty thousand Americans lost their homes due to foreclosure in 1982. Farming regions were especially hard hit. . . . In Illinois, foreclosures have risen 25-30% in the last fifteen months. . . ." *Report to the National Governors' Association*, *supra*, at 38.

Replacement housing for the poor is often unavailable. *See generally* C. Hartman, ed., *America's Housing Crisis* (1983). The private housing market since World War II has been unable to create adequate low income housing. Federal support for low income housing has waned since the 1970's. Budget authority for expanding low income housing assistance stood at $26.6 billion in 1980, $8.6 billion in 1983 and just $0.5 billion in 1984. Low Income Housing Information Service, *Special Memorandum No. 18*, at 2 (1983). One consequence has been an annual net loss in low income housing units, estimated at 500,000. *Displacement*, *supra*, at 3.

2. *Unemployment*

During the past two years, and until very recently, unemployment in the United States has been approximately ten per cent, a post-Depression high.[10] N.Y. Times, Sept. 23, 1983, at B10, col. 3. Rises in homelessness are directly related to rates of unemployment. Early in the Depression, demand for shelter

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10 An average of 9.7% of all civilian workers were unemployed in 1982 and over 10% were unemployed in each of the first five months of 1983. U.S. Department of Labor, *Current Labor Statistics*, 106 Monthly Labor Review 49, 55 (July 1983).

in New York City could be directly correlated to unemployment in the manufacturing industry, allowing for a one month lag between the two trends. N. Anderson, *Report on the Municipal Lodging House in New York City* xiv (1932). Fifty years later, another survey of homeless men in a New York shelter found that "loss of a job" was the most common explanation given by shelter residents for their homelessness. N.Y.C. Human Resources Administration, *Study of Long-Term Keener Clients* (May 1982), *reprinted in Congressional Hearing*, *supra*, at 194, 195.

Recently, unemployment has meant a more rapid descent into poverty than the unemployed experienced in previous recessions, due to both the greater length of the most recent recession and decreases in unemployment compensation.[11] Loss of a job in the early 1980's has exposed the unemployed worker, and his family, to a greater risk of homelessness than victims of earlier recessions. As unemployment has risen, the homeless population has become more diverse, including increasing numbers of skilled and educated people, and large numbers of young people.[12]

Recent reductions in unemployment rates have not resulted in a decrease in the number of the homeless. *The Homeless and*

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11 "The contrast with experience in the 1974-76 recession is especially striking. In fiscal year 1976 about three quarters of the unemployed were covered by unemployment compensation. In fiscal 1982 only 42 per cent were covered by compensation." *The Poverty Rate Increase: Hearing Before the Subcomm. on Public Assistance and Unemployment Compensation of the House Comm. on Ways and Means*, 98th Cong., 1st Sess. 1 (Oct. 18, 1983) (statement of Gary Burtless, Brookings Institution). In fiscal year 1976, about $31 billion (1982 dollars) were spent on unemployment insurance for 7.6 million unemployed. In 1982, $24 billion was spent on unemployment insurance for 10 million unemployed. N.Y. Times, Sept. 9, 1983, at D17, col. 1.

12 *See, e.g.*, N. Kaufman & J. Harris, *Profile of the Homeless in Massachusetts* 2 (1983): "There is a new population of homeless—people who have been working all their lives. . . ."; Andersen, *Left Out in the Cold*, Time, Dec. 19, 1983, at 14: "A great many are illiterate, but surveys in New York City and San Francisco found about the same proportion of college graduates as in the general population." *See also*, Boston Globe, Nov. 24, 1983, at 2, col. 5, reporting that Boston's Emergency Shelter Commission counted 2,800 homeless individuals on the streets in one night, including 35 boys and 12 girls under the age of 17.

the Economic Recovery, *supra*, at 1. High chronic unemployment continues in areas where homelessness is particularly prevalent, such as inner city areas.[13] According to the director of the Congressional Budget Office, the nation's poverty rate is likely to remain high for several years, despite the economic recovery currently under way. N.Y. Times, Oct. 19, 1983, at A22, col. 1. A recent nine-city survey of soup kitchens and emergency shelters found no evidence that the nation's economic recovery was being felt on the streets. *The Homeless and the Economic Recovery*, *supra*, at 1.

3. *Reductions in Aid Programs*

Cut-backs in assistance programs on both state[14] and Federal levels have contributed to homelessness in many ways. Reductions in food stamps have forced families to choose between purchasing food and paying rent. Reductions in health care programs and day care programs have forced reallocations in the already sorely strapped budgets of the poor. *Homelessness in America*, *supra*, at 25-26. In addition, in the past two years the Social Security Administration has intensified its review of persons receiving disability benefits. Fessler, *Senators Press*

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13 Nationally, 48.9% of Black men aged 16-19 were unemployed in 1982 and 43.9% in October 1983. U.S. Department of Labor, *Current Labor Statistics*, 106 Monthly Labor Review 68 (December 1983).

14 Cut-backs of benefits on a state-by-state basis are too complex to describe here, but the case of Pennsylvania demonstrates a clear link between diminished public assistance programs and homelessness. A 1982 revision of the Pennsylvania welfare code classified able-bodied men and women between the ages of 18 and 45 as "transitionally needy," and provided, with certain exceptions, that they were eligible for only 3 months of assistance in any calendar year. More than 68,000 people were removed from the state's rolls before a Federal district court declared the practice unconstitutional and ordered it halted. On appeal, that decision was reversed by the Third Circuit, *Price v. Cohen*, 715 F.2d 87 (3d Cir. 1983), which noted, however:

> "The plight of the two plaintiffs who are pregnant is especially poignant . . . . At a time when her health and nourishment are of exceptional importance to her child's development, a pregnant woman is denied assistance. In the case of one plaintiff, there was a possibility that she would be forced out on the street for the entire last trimester of her pregnancy. . . . We must assume that the legislature and Governor were aware of these potential consequences." *Id.* at 91.

Action to Ease Disability Review Procedures, 40 Cong. Q. Weekly Rep. 2242 (1982). By June 1983, more than 350,000 people had been taken off the rolls since the stepped-up reviews began. N.Y. Times, June 8, 1983, at A17, col. 1.[15]

Even before recent reductions in aid for the poor, families dependent on public assistance were severely affected by inflation.[16] The result of these factors has been to lower the resources available to the poor with which to pay for housing. According to the Urban Institute, while average earnings per family will have declined by four per cent across the nation during the period from 1979 through 1984, average welfare and food stamp benefits have declined by 14 per cent. F. Levy & R. Michel, *The Way We'll Be in 1984: Recent Changes in the Level and Distribution of Disposable Income* 4 (1983).

4. *Deinstitutionalization*

Experts estimate that anywhere between 20 per cent and 50 per cent of homeless single adults are victims of a significant mental disability. Baxter & Hopper, *Troubled on the Streets: The Mentally Disabled Homeless Poor* 5-6, in The Chronic Mental Patient: Five Years Later (J. Talbott ed.) (forthcoming). In the mid-1950's, about 650,000 people were hospitalized in psychiatric hospitals in the United States; currently, about 150,000 people are hospitalized. Leepson, *The Homeless: A Growing National Problem*, 11 Editorial Research Reports 796 (1982). The reasons so few persons are hospitalized today are many, ranging from the development of psychiatric drugs which can control certain types of mental disorders, to cost-

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15 Evidence compiled by the Mental Health Law Project "indicates that most often the loss of benefits is due to a severely checked ability on the part of the recipient to challenge the ruling—and not to a legitimate winnowing from relief rolls those who have recovered. Equally noteworthy, mental disability is over-represented in successful review cases ([*i.e.*] those that are discontinued) by a factor of three: roughly 11% of all disability checks go to the mentally disabled, but nearly a third of the discontinued cases are psychiatrically impaired." *Report to the National Governors' Association*, *supra*, at 47.

16 *See* K. Stallard, B. Ehrenreich & H. Sklar, *Poverty in the American Dream* 31 (1983).

conscious state governments responding to the fiscal impact of high in-patient populations, to the widely accepted professional belief that the mentally ill could be better cared for in community facilities rather than in remote asylums. *See generally* Pepper & Ryglewicz, *Testimony for the Neglected: The Mentally Ill in the Post-Deinstitutionalized Age*, 52 Amer. J. Orthopsychiat. 388 (1982) (hereinafter cited as *Testimony for the Neglected*).[17] The failure of government properly to implement deinstitutionalization is well documented: "[i]n the simplest terms, the patients from our state hospitals have been discharged into the community, but the dollars to support their care have not followed." *Testimony for the Neglected, supra*, at 389. Aggravating the problems caused by deinstitutionalization are current policies of restrictive admissions. *Id.* As a result, many severely disturbed mental patients are left to sleep in the streets.

D. Consequences: Survival and Death

The effects of homelessness are not difficult to fathom. Insecurity and persistent vigilence take their toll:

> "Whether the night is spent at a shelter, on the grates, or in an abandoned building, sleep is invariably fitful or brief or both. Exhaustion becomes the day's constant companion . . . . To remain awake, hour after hour, when the body and mind are crying out for rest, is sheer torture." *Homelessness in America, supra*, at 111; *see also Private Lives/Public Spaces, supra*, at 48.

While it may be difficult to determine whether physical and mental disabilities are antecedents to, or consequences of, life on the streets, *Report to the National Governors' Association, supra*, at 42, the damage is palpable and often severe. Com-

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17 In most of the United States, deinstitutionalization of mental health patients began in the late 1960's. By 1973, its implementation was described in a leading professional journal as "a national disgrace." Reich, *Care of the Chronically Mentally Ill: A National Disgrace*, 130 Am. J. Psychiatry 911 (1973); six years later the current president-elect of the American Psychiatric Association described it as "still a national disgrace." Talbott, *Care of the Chronically Mentally Ill: Still a National Disgrace*, 136 Am. J. Psychiatry 688 (1979).

mon physical ailments include circulatory difficulties leading to ulceration, chronic undernourishment, infections which refuse to heal, lice infestation, diabetes and hypothermia. R. Lander, *Health Needs of the Homeless* 4 (1983). Moreover, "previous or newly acquired instabilities are exacerbated, at times irreversibly." Baxter & Hopper, *The New Mendicancy*, 52 Amer. J. Orthopsychiat. 393, 406 (1982). Disorder or disorientation not only isolates the homeless sufferer from others who share his or her plight, it also may make such individuals extremely wary of offers of assistance and difficult to treat. *Private Lives/ Public Spaces, supra*, at 48; Segal & Baumohl, *Engaging the Disengaged: Proposals on Madness and Vagrancy*, 25 Social Work 358 (1980).

Even those fortunate enough to procure emergency shelter do not escape unscathed. Networks of former social associates are broken and family ties attenuated (where they exist at all). In a 1934 study of emergency shelters in Illinois, two researchers identified a "shelterization" phenomenon:

> "After a period of time [as little, they believed, as a few months], a man becomes less sensitive. . . . He shows a tendency to lose all sense of personal responsibility for getting out of the shelter; to become insensible to the element of time; to lose ambitions, pride, self-respect and confidence; to avoid former friends and to identify himself with the shelter group." Segal & Specht, *A Poorhouse in California, 1983: Oddity or Prelude?*, 28 Social Work 319, 322 (1983) (quoting E. Sutherland & H. Locke, *Twenty Thousand Homeless Men* 146 (1936)).

Similar phenomena have been observed today. Segal & Specht, *supra*, at 322.

In the extreme, exposure to the elements may result in death. Street deaths due to hypothermia are numerous. On the morning that Congressional hearings on the homeless were convened in December 1982, the District of Columbia reported the fourth street death of a homeless person in that month. Wash. Post, Dec. 15, 1982, at B12, col. 2. Over the 1983 Christmas weekend in New York City, fourteen people perished from the cold; six of them died from exposure in subways, abandoned buildings and on the street. N.Y. Times, Dec. 27, 1983, at A1,

col. 1. Recent estimates are that between 25 and 50 people die on the streets of New York City each winter month. M. Begun, *Misconceptions of Homelessness: Statement to the Metropolitan Council, American Jewish Congress* 12 (Mar. 10, 1983). These are routine deaths in large cities with harsh winters.[18] Others are more unusual: in Savannah, for example, two homeless men met their deaths when the garbage container in which each was sleeping was picked up and the trash compacted. Savannah Evening Press, Feb. 1, 1983, at 13, col. 2.

SUMMARY OF ARGUMENT

1. Respondents' proposed act of sleeping outdoors in winter, within the context of their proposed demonstration on the plight of the homeless, is protected expressive conduct within the meaning of the First Amendment. It meets this Court's requirement that for conduct to be "speech" there must be present an "intent to convey a particularized message" and the likelihood that under the circumstances "the message would be understood by those who viewed it." *Spence v. Washington*, 418 U.S. 405, 410-11 (1974).

2. (a) Because respondents' proposed demonstration would take place in public forums of unique political importance, governmental interests in banning sleeping must meet a standard of heightened scrutiny in order to outweigh respondents' First Amendment rights. The reasonableness standard urged by petitioners is improper.

(b) Petitioners have not shown, either factually or in terms of anticipated harm, that any properly defined governmental interest outweighs respondents' right to communicate their lack of shelter by sleeping in highly visible public forums in the nation's capital in winter.

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18 The Boston Globe has reported that, in the winter of 1982-83, "37 homeless people froze to death on Boston's streets . . . . The Emergency Shelter Commission expects the figures this coming winter to be worse." Boston Globe, Nov. 24, 1983, at 2, col. 5.

ARGUMENT

POINT I

SLEEPING OUTDOORS IN WINTER, WITHIN THE CONTEXT OF RESPONDENTS' PROPOSED DEMONSTRATION, IS PROTECTED EXPRESSIVE CONDUCT UNDER THE FIRST AMENDMENT

The constitutional focus of this case turns, to an unusual degree, on an evaluation of the conduct involved. The government characterizes respondents' proposed sleeping in the context of their demonstration as not expressive, or so minimally expressive as to require significant explanation before its point can be understood. Petitioners' Brief at 13.

That fundamental characterization is incorrect. The act of sleeping in public, in the winter, by homeless people conveys to most an immediate message that needs no sign or advertisement. Those who have passed the homeless asleep on park benches, in telephone booths, in discarded cartons and on grates and doorsteps are aware, without anything more being expressed, of a plight from which most individually recoil. Almost instantly one acknowledges the obviously desperate condition of such people. In such encounters, the homeless are, for the most part, unmistakable, and coming upon them when asleep often conveys their condition more vividly than any words. Sleeping outdoors in winter in a highly public place by respondents, as part of their 24-hour-a-day vigil to portray the plight of homeless Americans, accordingly falls squarely in the mainstream of expressive conduct and constitutes "speech" within the meaning of the First Amendment.

This Court has previously found a range of non-verbal activities to be expressive activities protected by the First Amendment, including demonstrating,[19] marching,[20] sit-ins,[21]

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19 *Edwards v. South Carolina*, 372 U.S. 229 (1963).

20 *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969); *Gregory v. City of Chicago*, 394 U.S. 111 (1969).

21 *Brown v. Louisiana*, 383 U.S. 131 (1966).

leafletting,[22] picketing,[23] displaying a flag,[24] wearing armbands,[25] and affixing a peace symbol to an American flag.[26] In those cases, a message was conveyed almost instantaneously because of the people involved and their particular setting: Blacks at a segregated lunch counter, students opposed to a questionable war. Words were not essential to the message.

The present case is no different. Respondents dispute both petitioners' assertion that sleep is not expressive and petitioners' attempt to trivialize sleep as a means of expression in the context of respondents' demonstration. Lack of a safe place to sleep is the very crux of the plight of the homeless. Conducting a peaceful demonstration in winter, which includes the act of sleeping outdoors in the cold, is an appropriate and effective way to communicate the scope and gravity of the homeless' need for shelter and of the helplessness most people feel about how to correct it. Respondents stated in their application for a park permit that the purpose of their proposed activity was "[t]o make visible and concrete the magnitude and the seriousness and the reality of homelessness," Joint Appendix at 9. The Court of Appeals majority found that:

> ". . . as applied to CCNV's proposed demonstration, the government's ban will clearly affect expression: there can be no doubt that the sleeping proposed by CCNV is carefully designed to, and in fact will, express the demonstrators' message that homeless persons have nowhere else to go." 703 F.2d at 592.

In its decisions evaluating expressive conduct, this Court has weighed two essential elements before concluding that any particular kind of conduct, including passive conduct, constitutes "speech". Those elements are, first, the context in which

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22 *Schneider v. State*, 308 U.S. 147 (1939).

23 *Thornhill v. Alabama*, 310 U.S. 88 (1940).

24 *Stromberg v. California*, 283 U.S. 359 (1931).

25 *Tinker v. Des Moines School District*, 393 U.S. 503 (1969).

26 *Spence v. Washington*, 418 U.S. 405 (1974).

the conduct takes place and, second, whether the conduct readily conveys a particularized message, *Spence v. Washington*, 418 U.S. 405, 410-11 (1974). The conduct contemplated by respondents satisfies this Court's standards on both points, as enunciated in numerous decisions.

In *Garner v. Louisiana*, 368 U.S. 157 (1961), the defendant demonstrators sought to portray their exclusion from lunch counters in the South where only whites were served. The Court found the convictions for violating a Louisiana disturbing the peace statute to be so devoid of evidentiary support as to be unconstitutional. Describing the defendants' activities, the Court stated that they "not only made no speeches, they did not even speak to anyone except to order food; they carried no placards, and did nothing, beyond their mere presence at the lunch counter, to attract attention to themselves or to others." *Id.* at 170.[27] As Justice Harlan wrote in his concurring opinion:

> "There was more to the conduct of those petitioners than a bare desire to remain at the 'white' lunch counter and their refusal of a police request to move from the counter. We would surely have to be blind not to recognize that petitioners were sitting at these counters, where they knew they would not be served, in order to demonstrate that their race was being segregated in dining facilities in this part of the country.
>
> Such a demonstration, in the circumstances of these two cases, is as much a part of the 'free trade in ideas,' *Abrams v. United States*, 250 U.S. 616, 630 (Holmes, J., dissenting), as is verbal expression, more commonly thought of as 'speech.' " *Id.* at 201.

In *Brown v. Louisiana*, 383 U.S. 131 (1966), the Court reversed the convictions of five Blacks who had refused to leave the reading room of a racially segregated public library

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27 While the Court's reasoning in *Garner* was on due process grounds, the case has been considered an important decision on expressive conduct and has frequently been cited in the context of the First Amendment. *See, e.g., Brown v. Louisiana*, 383 U.S. 131, 141-42 (1966).

and had been convicted under a breach of the peace statute. The Court stated:

> "We are here dealing with an aspect of a basic constitutional right—the right under the First and Fourteenth Amendments guaranteeing freedom of speech and of assembly, and freedom to petition the Government for a redress of grievances. . . . As this Court has repeatedly stated, these rights are not confined to verbal expression. They embrace appropriate types of action which certainly include the right in a peaceable and orderly manner *to protest by silent and reproachful presence*, in a place where the protestant has every right to be, the unconstitutional segregation of public facilities." *Id.* at 141-42 (emphasis added; footnotes omitted).[28]

In *Edwards v. South Carolina*, 372 U.S. 229 (1963), the Court overturned the convictions for breach of the peace of 187 Black high school and college students who had assembled near the South Carolina state capitol to protest racial discrimination by carrying signs and walking in an area of the State House grounds open to the public. Finding that the "circumstances in this case reflect an exercise of these basic constitutional rights in their most pristine and classic form," the Court held that in convicting the petitioners, South Carolina had infringed their "constitutionally protected rights of free speech, free assembly, and freedom to petition for redress of their grievances." *Id.* at 235.

In *Tinker v. Des Moines School District*, 393 U.S. 503 (1969), the Court found that the wearing of black armbands in

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28 Petitioners suggest that the sit-in cases are irrelevant to the issue before the Court because they involved "civil disobedience." Petitioners' Brief at 22, n.16. Such an assertion begs the question. First Amendment protections bear equally whether litigants seek to have criminal sanctions, such as arrest for breach of the peace, found unconstitutional or whether they seek in advance to void a prior restraint imposed by governmental regulation. Nor can petitioners mean to suggest that respondents' proposed sleeping is inexpressive, or non-speech, because respondents have not violated the law, but that it would be speech, and protected speech, if respondents engaged in "civil disobedience" by violating the Park Service's regulation.

a school environment was "closely akin to 'pure speech' which, we have repeatedly held, is entitled to comprehensive protection under the First Amendment." *Id.* at 505-06. Wearing black armbands, as the Court later stated in *Spence v. Washington*, 418 U.S. 405, 410 (1974), "conveyed an unmistakable message about a contemporary issue of intense public concern—the Vietnam hostilities." Regarding the "silent symbol" of black armbands, the Court found "[i]n the circumstances of the present case, the prohibition of the silent, passive 'witness of the armbands,' as one of the children called it, is no less offensive to the Constitution's guarantees." 393 U.S. at 510, 514.

In *Spence*, the Court found that defendant's use of a peace symbol on an American flag, "combined with the factual context and environment in which it was undertaken, lead[s] to the conclusion that he engaged in a form of protected expression." 418 U.S. at 410. The Court noted that it had "for decades . . . recognized the communicative connotations of the use of flags," and pointed out that "appellant communicated through the use of symbols. The symbolism included not only the flag but also the superimposed peace symbol." *Id.* The Court also found that the defendant's activity of displaying a flag with a peace symbol affixed was "roughly simultaneous with and concededly triggered by the Cambodian incursion and the Kent State tragedy, also issues of great public moment." *Id.*

The protected conduct in the foregoing cases is directly analogous to this case. Respondents' application to be permitted to sleep as part of their demonstration fully complies with the requirements of intent to convey a particularized message and likelihood that under the circumstances the message would be quickly understood by those who viewed it. As Judge Edwards, in his concurring opinion in the Court of Appeals, stated:

> "A nocturnal presence at Lafayette Park or on the Mall, while the rest of us are comfortably couched at home, is part of the message to be conveyed. These destitute men and women can express with their bodies the poignancy of their plight. They can physically demonstrate the neglect from which they suffer with an articulateness even Dickens could not match." 703 F.2d at 601.

Respondents' attempt to engage in a form of protected expression is intended to communicate the message that a large number of people are forced to survive in this country without shelter and that the isolated encounters most people have with the homeless are symptoms of a major social and political failing in our democracy. As with the black armbands in *Tinker* and the peace symbol in *Spence*, respondents seek to make a visual rather than oral impression or statement, through sleeping in highly public places. Their willingness to experience great discomfort and to sleep out in the cold, rain and snow shows for all to see the depth of their commitment and the seriousness of the predicament of the homeless.[29]

The passive physical activity in the sit-in and similar cases does not differ in principle from that involved here. Everybody sits and walks, just as everybody sleeps, and all three activities are engaged in primarily for non-expressive purposes. Nonetheless, walking can be done as part of a march or demonstration, and sitting can be part of a sit-in. This Court has found those uses of an individual's body to be protected expressive activities.[30] Petitioners' claim that the Park Service would be

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29 Petitioners are not being entirely straightforward in their attempt to trivialize sleep as speech. They are in the contradictory position of arguing, first, that sleep is a very passive activity and not expressive, and, second, that the government's interest in preventing sleep is great. Petitioner's Brief at 13-14, 35-38.

30 *See* cases discussed at 19-21, *supra*. *Morton v. Quaker Action Group*, 402 U.S. 926 (1971), is not to the contrary. There, the District of Columbia Circuit lifted the district court's nighttime curfew on an anti-war demonstration and permitted a section of the Mall to be used by the demonstrators to sleep in sleeping bags as part of their demonstration. *A Quaker Action Group v. Morton*, No. 71-1276 (D.C. Cir. Apr. 19, 1971), *vacated mem.*, 402 U.S. 926 (1971). This Court vacated the Court of Appeals summary reversal by a decree without opinion, *Morton v. Quaker Action Group*, 402 U.S. 926 (1971). As the decision was issued without opinion, its effect is governed by this Court's holding that summary disposition extends "only to 'the precise issues presented and necessarily decided by those actions.' " *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 499 (1981), (quoting *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (per curiam)). Since this Court's decision in *Morton v. Quaker Action Group*, the Park Service has, on at least two occasions, permitted demonstrators to sleep overnight in the parks at issue here. *See* 703 F.2d at 588-89; *see also* Record Document 5.

required to engage in content-based discrimination is incorrect. The Service need do no more than look to whether the purpose of sleeping as stated in the application form is made in good faith.[31]

The entire problem that petitioners advance regarding distinguishing between expressive and non-expressive sleep arises precisely *because* there are homeless people in America. If the homeless had shelter, petitioners could not allege that respondents want to sleep for non-expressive purposes, just as (since people can walk freely in this country) demonstrators cannot be said to walk in a demonstration for non-expressive purposes. It would be a sad paradox to deny the homeless the right to sleep for expressive reasons in a demonstration simply because there are homeless people in America who could conceivably sleep in such a demonstration solely for non-expressive purposes.

POINT II

THE NEW NATIONAL PARK SERVICE "ANTI-CAMPING" REGULATIONS ARE UNCONSTITUTIONAL AS APPLIED TO RESPONDENTS' PROPOSED SLEEPING

A. An Absolute Ban on an Expressive Activity in a Public Forum Traditionally Associated with a Broad Range of First Amendment Activities Is Justified Only If It Is Necessary to a Significant Government Interest.

Because respondents' proposed demonstration would take place in public forums of unique political importance, governmental interests in banning sleeping must meet a standard of

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31 The very regulations which prohibit "camping," in fact, provide that "temporary structures . . . may be erected for the purpose of *symbolizing a message* or meeting logistical needs. . . ." 36 C.F.R. § 50.19(e)(8)(1983) (emphasis added). As Judge Mikva noted below, the Park Service has already placed itself in the position of "evaluating requests for temporary structures 'for the purpose of symbolizing a message.' " 703 F.2d at 598 n.31 (quoting 36 C.F.R. § 50.19(e)(8)(1982)). In fact, the Park Service official who wrote one of the respondents to inform him that respondents' application for a permit had been granted in part, but that sleeping would not be allowed, stated in his letter that "[t]he erection of a *symbolic city* to emphasize the plight of the poor and homeless is hereby permitted." (emphasis added). Joint Appendix at 16-17.

heightened scrutiny in order to outweigh respondents' First Amendment rights. Petitioners, however, seek to prevent respondents' expressive sleeping without demonstrating the justification traditionally required for constitutional restrictions on protected speech. They contend that the Park Service regulations need only be reasonable in order to be constitutional, because the act of sleeping has little intrinsic speech value. Petitioners' Brief at 26.

The reasonableness standard urged by petitioners is one which this Court has applied only in the context of public property which, *unlike* Lafayette Park and the Mall, is not by tradition or designation a forum for public communication. *See Perry Education Association v. Perry Local Educators' Association*, ____ U.S. ____, 103 S.Ct. 948 (1983). However, as the Court explained in *Perry*:

> "[i]n places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the state to limit expressive activity are sharply circumscribed. At one end of the spectrum are streets and parks which 'have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.' " *Id.* at 954-55 (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939)).

Lafayette Park and the Mall are public forums of undeniably historic and symbolic significance. As petitioners admit, "[j]ust because these areas have a special place in the national consciousness and because they have such resonance, they also constitute a fitting and powerful forum for political expression and political protest." Petitioners' Brief at 11. A reasonableness standard is consequently improper for measuring the competing constitutional and governmental interests in the present case. Last term, with respect to other "expressive activities involving 'speech'," *United States v. Grace*, ____ U.S. ____, 103 S.Ct. 1702, 1706 (1983), the Court reaffirmed the importance of reviewing with heightened scrutiny regulations on political speech in such public forums:

> "In such places, the government's ability to permissibly restrict expressive conduct is very limited. . . .

> [R]estrictions such as an absolute prohibition on a particular type of expression will be upheld only if narrowly drawn to accomplish a compelling government interest." *Id.* at 707.[32]

Consistent with *Grace*, this Court has applied a heightened standard of review to forms of symbolic speech involving otherwise regulable activities. As stated in *United States v. O'Brien*, 391 U.S. 367 (1968), where the Court upheld the regulation against destruction of draft cards only after reviewing it with a heightened degree of scrutiny, "[t]o characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong." 391 U.S. at 376-377 (footnotes omitted).[33]

Petitioners themselves refer to the regulations as a "general prohibition," or "bar" on sleeping and interpret its effect as being such that "nobody may sleep over in Lafayette Park or the Mall." Petitioners' Brief at 15 and 11. In light of this absolute prohibition, petitioners must demonstrate a significant governmental purpose which is substantially served by

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32 Petitioners argue that the regulation at issue in the present case is, on its face, content-neutral and that only regulations "directed at expression," Petitioners' Brief at 31, are subject to strict scrutiny under the First Amendment such that a "compelling" government interest need be shown. The *Grace* decision holds otherwise. There the compelling interest standard was applied by this Court to a statute which did not regulate content but which imposed a total ban on a particular type of expression within a "public forum."

33 That respondents' proposed sleeping may appear to petitioners to be lacking in speech value or conformity to traditional modes of communication does not rob it of First Amendment protection: "We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated. That is why '[w]holly neutral futilities . . . come under the protection of free speech as fully as do Keats' poems or Donne's sermons,' . . . and why 'so long as the means are peaceful, the communication need not meet standards of acceptability.' " *Cohen v. California*, 403 U.S. 15, 25 (1971) (quoting *Winters v. New York*, 333 U.S. 507, 528 (1948) (Frankfurter, J., dissenting) and *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971)).

prohibiting that expression.[34] Under any form of heightened scrutiny the Park Service regulations must fail.

B. Petitioners Have Failed to Demonstrate Any Significant Government Interest Which Will Be Served by Denying Respondents the Right to Engage in Expressive Sleeping at Their Symbolic Campsites.

1. Petitioners Have Demonstrated No Factual Basis for Their Asserted Interest in Prohibiting Respondents from Sleeping.

Petitioners seek to justify the Park Service regulations by asserting a governmental interest in "the preservation of these unique parks so as to fulfill their special and manifold purposes." Petitioners' Brief at 17. That generalized interest is, no doubt, admirable. However, as so defined, that formulation of the government interest obscures the real issues at stake, thereby minimizing the speech right of respondents and prejudging the balancing of interests which the First Amendment requires.[35] The true governmental interest must be defined with reference to the actual harms which the Park Service regulations are designed to prevent.

Several possible harms are claimed: (1) the strain on park resources and services because of the number of demonstra-

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34 Moreover, when, as here, regulations have been revised specifically to undo a prior court ruling favorable to these same demonstrators and involving the same expressive activities in the same forum, *see* Petitioners' Brief at 5, n.4, strict scrutiny of the claimed government interest should not be lightly abandoned, regardless of the apparent content-neutrality of the regulation. "[T]he regulation of certain forms of communication for reasons other than their content may discriminate de facto (or even intentionally, though in a way that may not be provable) against certain clusters of messages . . . a more serious threat should be required when there is doubt that the speaker has other effective means of reaching the same audience." J. Ely, *Democracy and Distrust: A Theory of Judicial Review* 111 (1980).

35 As John Hart Ely has indicated, generalizing the level of government interest involved will render the requirement of a "substantial" interest, *United States v. O'Brien*, 391 U.S. at 377, always satisfiable. Ely, *Flag Desecration: A Case Study In the Roles of Categorization and Balancing in First Amendment Analysis*, 88 Harv. L. Rev. 1482, 1486 (1975).

tors, Petitioners' Brief at 16 and 39, and the proposed duration of the demonstration, *id.* at 16; (2) a purported "monopol[y]" on the Memorial-core area parks by respondents, to the exclusion or inconvenience of other potential users, *id.* at 16 and 42; and (3) the detrimental effects of "camping" activities, such as cooking, building fires, storing personal belongings, and digging latrines, to which sleeping, if permitted, may purportedly lead, *id.* at 16.

Respondents, however, have never sought to engage in any such activities. In addition, petitioners fail to show that a ban on sleeping *actually* serves an interest in preventing any of the harms they foresee. The number of demonstrators is already regulable by the park authorities.[36] A desire to see fewer than the approved number actually participate in the demonstration is not a legitimate justification for the prohibition on expressive sleeping.[37] The durational concerns are covered by other parts of the regulations which provide that, for example, demonstrations in Lafayette Park are permissible for seven days only, unless renewed, 36 C.F.R. § 50.19(e)(5)(i) (1983). In any event, the Park Service has limited discretion for refusing or revoking permits if the proposed "nature or duration" of the demonstration "cannot reasonably be accommodated," 36 C.F.R. § 50.19(d)(3) (1983). Fears of "monopolization" are unfounded, since the regulations take into account competing

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36 In fact, the number of demonstrators for whom respondents seek permission to sleep—50 in Lafayette Park—falls far below the limit of 3,000 persons permitted by the regulations to conduct a demonstration in Lafayette Park at any one time. *See* 36 C.F.R. § 50.19(e)(2) (1983). In addition, respondents seek a permit for 100 to sleep on the Mall, where there is no limit to the number of permitted demonstrators under Park Service regulations.

37 Nor is a concern that the sight of homeless persons sleeping in Lafayette Park may offend passersby a constitutionally acceptable reason to restrict virtually their only form of political expression. " 'It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.' " *Spence v. Washington*, 418 U.S. at 412 (quoting *Street v. New York*, 394 U.S. 576, 592 (1969)). In order to justify the prohibition of a particular communication, petitioners must demonstrate "more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Tinker v. Des Moines School District*, 393 U.S. at 509.

uses for park resources. *See* 36 C.F.R. § 50.19(d)(1) and (e)(5) (1983).

Consequently, the *only* possible harm not covered by other provisions of the regulations are those asserted to result from "camping" activities. Yet petitioners have made no factual showing that the demonstration activities for which respondents seek a permit will result in any of the harms outlined above, even though last year's demonstration, which involved sleeping, provided petitioners with the opportunity to establish just such a factual basis, if it existed. In the absence of any factual showing, petitioners rely on speculation and suggestion and show no more than "an undifferentiated fear or apprehension of disturbance [which] is not enough to overcome the right to freedom of expression." *Tinker v. Des Moines School District,* 393 U.S. at 508.[38]

At most, petitioners seek to prevent respondents from sleeping at their demonstration site assertedly because sleeping *may* lead to camping activities, arguing that "[i]t makes no sense to forbid camping without forbidding its central necessary constituent: sleeping overnight in tents." Petitioners' Brief at 47. Yet several "necessary" elements of camping are already permissible under the regulations, such as an overnight physical presence and the setting up of tents, and many other necessary elements of camping will not be available to respondents even if their request to engage in expressive sleeping is granted. Sleeping may be necessary for camping but, as the Court of Appeals concluded in its earlier decision, it does not follow that sleeping constitutes camping. *Community for Creative Non-Violence v. Watt,* 670 F.2d 1213, 1217 (D.C. Cir. 1982).

Petitioners concede that sleeping is an intrinsically passive, nondisruptive, quiet activity, *see* Petitioners' Brief at 14, and this Court has always required a greater showing of demonstrated harm in order to justify government restrictions on "a silent, passive expression of opinion, unaccompanied by any disorder or disturbance." *Tinker v. Des Moines School Dis-*

38 Nor have respondents sought a permit to camp, to display "illuminated placards" or to play "recorded messages broadcast on a loudspeaker." Petitioners' Brief at 14. Even if respondents had requested permission to use sound amplification equipment, any potential harms arising therefrom are specifically addressed by existing regulations. *See* 36 C.F.R. § 50.19(e)(11) (1983).

trict, 393 U.S. at 508. Petitioners' ultimate concern with regard to "camping" is not likely about respondents' proposed sleeping, so much as a concern that respondents' demonstration will be effective if sleep is permitted. *See* Petitioners' Brief at 39.

2. A Total Ban on Respondents' Proposed Sleeping Is Not Necessary to Petitioners' Asserted Interest.

Even assuming that petitioners had shown a significant government interest to be furthered by the Park Service ban on sleeping, the regulations are not "narrowly tailored" to the government's purpose and are more restrictive of First Amendment rights than is necessary. Petitioners brush aside the cases which require that restrictions on "speech" be "no greater than is essential," *United States v. O'Brien,* 391 U.S. at 377, or "narrowly tailored to serve a significant government interest," *Perry Education Association v. Perry Local Educators' Association*, 103 S.Ct. at 955, by claiming that such tests are "not intended to give the courts the power to decide that a fifteen inch flyswatter must be used rather than a sixteen inch one because it is 'less restrictive.' " Petitioners' Brief at 49 n.41. No such question of measurement or degree is raised by petitioners' total prior restraint here.

Rarely will prior restraint on a form of expression be the least restrictive means of protecting a government interest. "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *New York Times Co. v. United States,* 403 U.S. 713, 714 (1971).[39] Where, as here, the restraint will have such a critical effect on the political expression of otherwise "discrete and insular minorities," *United States v. Carolene Products Co.,* 304 U.S. 144, 153 n.4 (1938),[40] less drastic means of furthering the government interest must be considered. When there is no direct causal connection between the prohibition and the harms to be prevented, insisting on regulations tar-

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39 *See also Shuttlesworth v. Birmingham,* 394 U.S. 147 (1969) (holding that a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective and definite standards to guide the licensing authority, is unconstitutional).

40 *See also* Ely, *Democracy and Distrust, supra,* at 75-77.

geted at those specific harms provides some safeguard for the affected speech, while at the same time allowing for effective regulatory enforcement. As Judge Edwards demonstrated in his concurring opinion below, this can easily be done. 703 F.2d at 604. Any offending conduct which might occur, such as cooking, building fires, storing personal belongings or digging latrines, could thus be dealt with more effectively through sanctions pursuant to existing regulations or revocation of the permit, rather than through prior restraints on unrelated activities. Nor would insisting that petitioners employ a less drastic means impose problems of enforcement on park authorities. In fact, recognizing and sanctioning the activities which may actually damage park resources should be far easier than enforcement of petitioners' tenuous distinction between feigned and actual sleep.

CONCLUSION

For the reasons stated above, the judgment of the Court below should be affirmed.

February 1, 1984

Respectfully submitted,

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